No. 12,482

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY
(a corporation),
Appellant,

vs.

WILLIAM A. BELLAMY,
Appellee.

APPELLANT'S REPLY BRIEF.

LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
440 Montgomery Street, San Francisco 4, California,
Attorneys for Appellant.

R. S. CATHCART,
440 Montgomery Street, San Francisco 4, California,
Of Counsel.

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APPELLANT'S REPLY BRIEF.

Appellee in his brief has made the claim that our brief is "false and misleading" (Appellee's Brief, p. 2), and has wound up by suggesting that appellant merits the rigors of Rule 26(2).

Although we compliment appellee's zeal, we suggest that his claims deserve close scrutiny, and turn now to discuss, *seriatim,* certain assertions made by him.

A. THERE WAS NO EVIDENCE THAT APPELLEE'S DUTIES REQUIRED HIM TO TAKE A POSITION IN THE HIGHWAY.

It is claimed by appellee (Brief p. 5) that he "was *required* to drop off the moving cut of cars and take a position upon the highway."

As we understand the testimony, appellee dropped off the train for the purpose of receiving signals from the crew at the east of the movement and passing them to the engineer (Tr. 52, 53, 124, 258-9). He also, apparently, was to act as the eyes of the engineer respecting conditions at the west end of the movement (Tr. 238-9).

We do not see how it can be claimed that this activity *"required"* him to take a position in a heavily travelled highway (much less to run into the highway). Lechner, the conductor, had taken position on the south side of the road, and was performing the function of passing signals (T. 182-183). The fact is, as obviously appears from the physical evidence (Plaintiff's Exhibit No. 6), that appellee could have very readily discharged his duties by taking a safe position on the south side of the highway where Lechner was at the time of the accident.

We still fail to find any place in the testimony which suggests that appellee was *required* to be in the highway.

This is of particular significance when it is borne in mind that the "workmen in the street cases" involve situations where the task of the injured party actually *required* him to be in the street: a person digging a

hole in the middle of a highway cannot dig it unless he is in the middle of the highway; in the instant case, it is undisputed that the area immediately to the south of the highway was clear and available to appellee had he chosen to use it. In this connection, it is clear (we submit) that appellee had only to glance in either direction on the highway and then to walk across the highway and take a position of safety on the south side of the highway.

To summarize, we submit that appellee's claim that his duties "required" him to be in the heavily travelled highway was wholly unsupported by the evidence.

It is true, of course, that the engineer, Edwards, testified that he considered appellee's position a "proper" one (Tr. 205). Edwards' testimony that appellee's position was "proper" is, however, not evidence that it was *necessary*. Indeed, in this respect, Edwards testified that it was matter of choice with appellee (T. 209-211).

On the question of whether appellee's action in taking position in the highway was in accordance with "custom and practice", Lechner, the conductor, testified (T. 258-259) in the affirmative; he qualified his testimony, however, by saying that such custom and practice would involve *looking* before dashing into the highway (T. 260).

It is hardly necessary to point out (i) that custom and practice will not excuse negligence and (ii) that custom and practice does not establish that appellee's duties *required* him to be in the highway.

B. THERE WAS NO EVIDENCE THAT APPELLANT'S DRIVER WAS MORE THAN 1000 FEET FROM APPELLEE WHEN HE "ROUNDED THE CURVE" AND THAT THE DRIVER HAD APPELLEE IN HIS "UNOBSTRUCTED VIEW" FOR A DISTANCE OF 500 FEET.

It is argued by appellee (Brief, p. 7) that the physical facts which the jury was entitled to consider showed that appellant's driver was more than 1000 feet from plaintiff when he rounded the curve, and that (Appellee's Brief, p. 9) appellant's driver had appellee in view for a distance of 500 feet before the impact.

The evidence offered by the plaintiff (Plaintiff's Exhibit No. 6), as well as the two photographs printed between pages 2 and 3 of appellee's brief, demonstrate that the accident occurred at the apex of a curve where vision up and down the highway was restricted.

Furthermore, even if the evidence might lend itself to the construction originated by appellee, it is obvious, we submit, that appellee, under his construction of the facts, would be hoisted by his own petard: if appellant's driver could have seen appellee 500 feet, it is equally clear that appellee, by the slightest exercise of care, could have seen appellant's driver and vehicle at a like distance, and that had he so much as glanced in the direction from which traffic could be expected, the accident would not have happened.

C. THERE IS NO EVIDENCE THAT APPELLANT'S DRIVER STRUCK APPELLEE WITH THE FRONT END OF THE TRUCK BODY.

Edwards, called as a witness by appellee, testified that "the rear end, the rear fender, caught Mr. Bellamy in the back" (T. 175).

Appellee in his brief argues that there is evidence from which the jury could have found that appellee was struck by the *front* of appellant's vehicle (Appellee's Brief, pp. 14-15).

Appellee points out that appellant's driver told the witness Lechner that "First I know the man was right in front of me, and I tried to miss him, but I guess I didn't" (Brief, p. 12). Appellee also argues (Brief, p. 14) that the injuries sustained "in themselves show that plaintiff was struck with terrific force and that he was struck not as claimed by defendant's driver Carlson by the rear fender, but by the front end of the truck body".

We submit that neither of the portions of evidence relied upon by appellee afford the slightest support for appellee's claim that he was struck by the front of appellant's vehicle, particularly in view of the uncontradicted and unqualified testimony of appellee's witness Edwards that appellee was struck by the right rear fender of appellant's vehicle.

Carlson, appellant's driver, testified that he saw appellee hanging on the box car. As stated in appellee's brief (p. 10), "Carlson actually saw plaintiff hanging on the box car as he drove around the curve". It is obvious that at the time in question appellee was

"in front of" appellant's driver. That is all that can be claimed with respect to the statement made by appellant's driver to the witness Lechner.

We can hardly take seriously appellee's unqualified assertion that the nature of his injuries shows that he was struck by the front of appellant's vehicle rather than by the right rear fender.

With respect to this claim of appellee, we quote as follows from 7 Cyc. of Fed. Proc., p. 578, sec. 3349:

> "Evidence which does no more than open the door to *speculation* is not sufficiently substantial to support a verdict. If the probative force of the evidence in favor of a party having the burden of proof does not go beyond creating a mere suspicion, a verdict should be directed against him. Neither will his unreasonable or improbable testimony be sufficient to take the case to the jury."

D. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN APPELLEE'S CLAIM THAT HE WALKED INTO THE HIGHWAY; ON THE CONTRARY, HIS OWN TESTIMONY ESTABLISHES CONCLUSIVELY THAT HE RAN FROM A PLACE OF SAFETY OUT INTO THE STREAM OF TRAFFIC.

We set out in our opening brief (pp. 14-15) appellee's account of his movements from the moment he left the train until the moment of impact.

Appellee claims (Brief, pp. 15-16) that he *walked* into the street.

It is very clear from a reading of appellee's testimony that he *ran* into the street.

This testimony did not express a mere opinion or estimate, but was an unqualified sworn statement of appellee as to his activities at the time of the accident. As stated in an annotation in 169 A.L.R. 798 at 800:

> "If a party testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case, his adversary is entitled to hold him to it as an informal judicial admission."

Appellee seeks to escape the binding effect of his own account of the manner in which the accident happened by invoking (Appellee's Brief, p. 2, footnote 3) certain California cases which held that under the facts of the case the jury was entitled to accept a version more favorable than the testimony of the injured party would suggest.

An analysis of these cases demonstrates, however, that the general rule stated in the annotation just referred to obtains in California. Thus, in *Gibson v. County of Mendocino* (1940) 16 Cal. 2d 80, the party whose negligence had injured the plaintiff claimed that she was bound by her own testimony; the court pointed out (p. 87) that the witness "was not making an admission or testifying to a fact peculiarly within her own knowledge * * * she, therefore, was not conclusively bound by her own testimony".

We submit that the language used by the court shows that where the witness *is* "testifying to a fact

peculiarly within" the knowledge of the witness, the party-witness is bound by his own testimony, in accordance with the general rule above referred to.

Accordingly, when appellee testified that he ran into the highway, he adopted a version of the facts from which he may not now depart.

E. THE "WORKMEN IN THE STREET" CASES RELIED UPON BY APPELLEE INVOLVE SITUATIONS WHERE WORK WAS ACTUALLY BEING DONE IN THE STREET AND AFFORD NO ANALOGY TO A SITUATION WHERE (AS HERE) THE "WORK" COULD HAVE BEEN DONE AS READILY, AND IN SAFETY, AT A POSITION OTHER THAN IN THE HIGHWAY.

We have already shown (point A, supra) that appellee was not *required* by his duties to work in the highway, much less to run out into the highway.

In the cases invoked by appellee (Appellee's Brief, pp. 22-30), it will be noted that the workmen involved were engaged in performing some duty which, in the nature of things, could be performed *only* on the highway.

They are not authority for the proposition that a workman who can as readily perform his duties in a place of safety—the clear area on the south shoulder of the highway—is entitled to special consideration when of his own free will he chooses a perilous place to work.

F. THERE IS NO SUPPORT IN THE AUTHORITIES FOR APPELLEE'S CLAIM THAT APPELLANT'S DRIVER WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

Appellee makes the bald assertion (Brief, p. 30) that the evidence "conclusively establishes negligence as a matter of law", and cites four cases (Brief, pp. 21-35) which he claims support that contention.

In the first three of these cases—*Quinn v. Rosenfeld* (1940) 15 Cal. 2d 486, 102 P. 2d 317; *Fuentes v. Ling* (1942) 21 Cal. 2d 59, 130 P. 2d 121, and *Jacoby v. Johnson* (1948) 84 Cal. App. 2d 271, 190 P. 2d 243—the question of negligence was held to be one of fact and not of law. In the fourth case—*Huetter v. Andrews* (1949) 91 Cal. App. 2d 142, 204 P. 2d 655—the injured party observed the defendant's car when it was 850 feet away; in the instant case, appellee did not even look for approaching vehicles; in the cited case, the defendant, although he looked straight ahead the entire time, did not see the adverse vehicle until it was too late for him to avoid it; in the instant case, as we pointed out in our opening brief (p. 18), appellant's driver observed appellee at a place of safety and caught a glimpse of him as he jumped off the car (Tr., pp. 328-329). There is nothing anywhere in the evidence contrary to appellee's testimony on this point, and no reasonable basis upon which it could be rejected.

It follows that the cases cited by appellee wholly fail to support his claim that appellant's driver was guilty of negligence as a matter of law.

G. THE AUTHORITIES RELIED UPON BY APPELLEE DO NOT ALTER THE RULE THAT A PEDESTRIAN WHO CROSSES A WELL-LIGHTED THOROUGHFARE OTHER THAN ON A CROSSWALK, IN A DIAGONAL LINE AND WITH HIS BACK PARTLY TURNED TO APPROACHING TRAFFIC AND IS STRUCK BY A CAR APPROACHING FROM THE QUARTER FROM WHICH TRAFFIC WAS TO BE EXPECTED IS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

Attempting to reply to our argument (Appellant's Opening Brief, pp. 21-27, appellee, in his brief (pp. 35-42) asserts that *Mundy v. Marshall* (1937) 8 Cal. 2d 294, involved a pedestrian who was drunk. The opinion does not so state, but that is, of course, beside the point because the rights of drunk persons are at least no greater than the rights of sober persons. The fact is that all persons who enter a highway "in a diagonal line" with their "back partly turned to approaching traffic" and are "struck by a car approaching from the quarter from which traffic was to be expected" are guilty of negligence as a matter of law under the rule of *Mundy v. Marshall.*

Appellee apparently adopts the view that *Mundy v. Marshall* has been overruled by *Salomon v. Meyer* (1934) 1 Cal. 2d 11, which, of course, was decided three years before *Mundy v. Mundy* and, therefore, cannot be said to overrule it.

Appellee also relies upon *Fuentes v. Ling* (1942) 21 Cal. 2d 59. Appellee does not state all the facts of the case, but it is interesting to note that the pedestrian observed the vehicle which struck him when the vehicle was 200 feet away "with nothing to obstruct his view". The court held that under the circumstances the injured person was not guilty of contrib-

utory negligence as a matter of law. There was no evidence anywhere in the record that appellee observed appellant's vehicle at any time before the impact.

H. HAVING PREVAILED IN THE COURT BELOW, APPELLEE IS IN NO POSITION TO COMPLAIN OF INSTRUCTIONS GIVEN BY THE TRIAL COURT.

In his final point, appellee spends considerable time (Brief, pp. 53-61) complaining of instructions given by the trial court.

It is unnecessary to point out that, having prevailed, appellee is in no position to complain of these instructions. 5 Cor. Jur., p. 161, "Appeal and Error", sec. 1498.

Dated, San Francisco, California,
June 16, 1950.

Respectfully submitted,
LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

R. S. CATHCART,
Of Counsel.